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In the Supreme Court
OF THE
United States

OCTOBER TERM 1956 - 1957

No. ~~432~~ 22

BERT STRAND, Sheriff of San Diego County, State of California,
Petitioner,

vs.

WILLIAM SCHMITTROTH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
600 State Building, San Francisco 2, California,
Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Bert Strand, Sheriff of San Diego County, State of California, prays that a writ of certiorari issue to review the judgment of the U. S. Court of Appeals for the Ninth Circuit, entered in the above case on May 3, 1956.

OPINIONS BELOW.

Both the majority and dissenting opinions of the Court of Appeals for the Ninth Circuit, printed in

Appendix A, hereto, are reported in 233 Fed. 2d at 598. The additional dissenting opinion filed on the denial of the petition for rehearing is reported in 234 Fed. 2d .... A copy of that opinion is also printed in Appendix A.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 3, 1956 (App. A). The U. S. Attorney joined in the request for a rehearing. After due consideration the Court denied a rehearing on August 2, 1956 (App. A). A stay of mandate has been granted pending the filing of this petition. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1254(1).

QUESTIONS PRESENTED.

Does the District Court, prior to the entry of an objection in the State Court by an agent of the federal government, have power to discharge by a writ of habeas corpus a state prisoner being held for trial where the prisoner is a federal probationer?

The statement of this broad question includes several sub-questions.

Does the rule of comity require that an objection by a representative of the first sovereign be made in the tribunal of the second sovereign which is exercising jurisdiction?

May the second Court, in this case a State Court, rely on the doctrine of implied consent, i.e. proceed

unless there is an objection made in the second Court on behalf of the Court first acquiring jurisdiction in a criminal matter?

Does the doctrine of federal supremacy preclude a State Court from trying a federal probationer?

Did the U. S. District Court have power under § 2241, title 28 *U. S. Code*, to grant the writ of habeas corpus to the petitioner?

STATUTES INVOLVED.

28 *U.S.C.* 2241.

STATEMENT.

The facts stated simply are as follows: A District Court at the request of a federal probationer ordered the federal probationer released from the sheriff of San Diego County. The sheriff was detaining the probationer for trial in the State Court. No objection by a representative of the federal government has ever been made in the State Court. The order of the District Court was made solely on the ground that the State prisoner was a federal probationer.

In more detail the facts are as follows:

A complaint was issued in San Diego County against William Roth, true name William Schmittroth, on September 15, 1953, charging him with uttering a check bearing a fictitious name. (See Tr. 14, also Tr. 6.)

In January, 1955, William Schmittroth entered a plea of guilty in the Los Angeles District Court, Los Angeles, California, to the charge of transporting a false security in interstate commerce. On January 17, 1955, defendant was granted five years probation by Judge Carter, sitting in the United States District Court for the Southern District of California, Southern Division. (Tr. 9.)

Some time in January, 1955, said William Schmittroth was delivered to the custody of the San Diego Police Department on a warrant issued by the San Diego authorities. Preliminary hearing was set February 10, 1955, in the Municipal Court of San Diego Judicial District. On February 8, 1955, Schmittroth filed a petition for a writ of habeas corpus in the United States District Court, San Diego. The preliminary examination was held in the Municipal Court. The Municipal Court determined there was reasonable cause to believe that petitioner has committed an offense against the State of California, and ordered petitioner held in custody of the sheriff pending further proceedings. (Tr. 4.)

The United States District Court ordered the Sheriff of San Diego to show cause on the writ of habeas corpus on the 17th day of February, 1955. An answer to the petition for writ of habeas corpus was filed, together with an affidavit in oppositon to the petition. (Tr. 12, 14.) On February 17, 1955, the United States District Court ordered the discharge of the petitioner. (Tr. 17.) The District Attorney of San Diego County filed a petition for a rehearing

on February 21, 1955. Said petition was denied and findings of fact and conclusions of law were filed, together with a judgment on March 11, 1955.

An appeal was taken to the U. S. Court of Appeals for the Ninth Circuit. That Court rendered the opinions set out above and appearing in the appendix.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT, WHICH FOLLOWS A DECISION IN THE TENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE SECOND AND SEVENTH CIRCUITS ON THE QUESTIONS OF ASSUMED CONSENT AND THE USE OF THE WRIT OF HABEAS CORPUS.

The decision of the Court of Appeals for the Ninth Circuit in the present case follows a similar split decision in the Tenth Circuit, *Grant v. Guernsey,* 63 F. 2d 163, and is in conflict with *U. S. ex rel. Pasela v. Fenno,* 167 F. 2d 593 (2d Cir. 1948), and *Spellman v. Murphy,* 217 F. 2d 247, (7th Cir., 1954) on the questions of assumed consent and the proper use of the writ of habeas corpus. The decision of the majority acknowledges the conflict in principle between its decision and the decisions of the Court of Appeals for the Second and the Seventh Circuit. The majority opinion at page 9 states:

> "Despite the wide adherence to the rule of the Guernsey case, supra, [63 Fed.2d 163, 10th Cir., 1933, cert. den. 279 U.S. 744, 1935] some courts have expressly refused to follow it. In *United States ex rel. Pasela v. Fenno,* 167 Fed. 2d 593, 595,

2d Cir., 1948, [cert. granted 334 U.S. 857, 1948, but dismissed by stipulation of counsel, 335 U.S. 806, 1948], the court stated, 'We understand the Guernsey case to hold that the second court, purportedly assuming jurisdiction, is entirely lacking in it. . . . If this is the holding of that decision, we decline to follow it.' *United States of America ex rel. Spellman, Jr. v. Murphy*, 217 Fed. 2d 247, 7th Cir. 1954, reached the result announced in the Pasela case."

The majority opinion expressly relies on the case of *Grant v. Guernsey*, 63 Fed. 2d 163, 10th Cir. 1933, cert. den. 279 U.S. 744, 1935. That case is admittedly identical in fact pattern to the present case. The Federal District Court issued a writ of habeas corpus and the Court of Appeals by a split decision affirmed the action of the lower Court.

Likewise the *Fenno* and *Murphy* cases are in conflict with the opinion of the Court of Appeals for the Ninth Circuit on the question of assumed consent. The Second Circuit rule provides that in the absence of an objection expressed by the first jurisdiction in the tribunal of the second jurisdiction, the second jurisdiction may assume the consent of the first jurisdiction. We feel that the rule announced in the *Pasela* case is in accord with the doctrine of comity which seeks to promote conciliation and harmony between respective jurisdictions.

This Court should settle the question of the implied consent in order that the State Courts may be given guidance among the conflicting decisions of the Courts of appeals.

This Court should likewise settle the question of whether the writ of habeas corpus can be used as an injunction or a writ of prohibition as was done in this case.

II.

THE IMPORTANCE OF THE QUESTION.

The question here presented is one of widespread and continuing importance to law enforcement agencies and the trial Courts of the federal, state and local governments. As pointed out by the dissent, there are numerous questions raised by this decision and left unanswered. This decision affects every law enforcement agency and every Court in its dealings with every probationer and every parolee.

Not only is it a matter of great practical importance, but also it is a problem which stands in the delicate area of federal-state relationships. This problem should be authoritatively determined by this Court and not left shrouded in conflict and confusion. Certainly we should not have one rule in New York and Illinois and another for Colorado and California.

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

A. The decision of the Court of Appeals authorizes the use of the writ of habeas corpus as an injunction or a writ of prohibition.

The majority opinion has completely failed to answer our contention that the District Court was without power under section 2241, title 28 of *U. S. Code** to grant a writ of habeas corpus to petitioner.

Section 2241, title 28, *U.S. Code*, provides that a writ of habeas corpus shall not extend to a prisoner unless he falls within one of four specific subsections. (See Appendix B.) The only subsection which could reasonably apply in this situation is subdivision 3 which refers to a petitioner, "in custody in violation of the Constitution or laws or treaties of the U. S." In the present case the state authorities had *actual possession* of petitioner and were affording him the full opportunity to present a defense, including the right of the federal government to enter an objection on the basis of the rule of comity concerning first acquired jurisdiction. Thus the State Court had jurisdiction. E.g. *Kerr v. Illinois*, 119 U.S. 436, 1886. Also see *Hebert v. Louisiana*, 272 U.S. 312, 315. It follows that any question concerning the rightfulness of what was done in the exercise of that jurisdiction, including its consideration of the problem of comity, affects no right or immunity granted the petitioner by the constitution, laws or treaties of the U. S.

*See Appendix B.

See *Morse v. U. S.*, 267 U.S. 80, 82; *Werntz v. Looney*, 10th Cir., 208 Fed. 2d 102, 104; *U. S. v. Farrell*, 8th Cir., 87 Fed. 2d 957.

The writ of habeas corpus is not a proper remedy for the consideration of the question of comity as to the first acquired jurisdiction. The orderly administration of justice would seem to require the proper agent of the first sovereign to object in the Court of the second sovereign. The writ of habeas corpus is not a proper procedure to review the application or the failure to apply the rule of comity to the second Court acquiring jurisdiction.

Petitioner has a right of appeal from the lower State Court. It is the clear policy of Congress that criminal cases arising under state law shall be tried in the State Courts *subject to review* by the U. S. Supreme Court of any federal questions involved.

The writ of habeas corpus should not be permitted to be used as an injunction or a writ of prohibition which prevents the State Court from proceeding to try a criminal case arising under state law.

This Court, in the case of *Stefanelli v. Minard*, 342 U.S. 117 at 120, discussing the problem of enjoining criminal prosecutions, stated as follows:

> "Special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law, has been an historic concern of congressional enactment. (Citations omitted). This concern has been reflected in the decisions of this court, not governed by explicit congressional requirement, bearing on a

state enforcement of its criminal law. (Citations omitted.) It has received striking confirmation even where an important countervailing federal interest was involved . . ."

Likewise, see *Baker v. Grice,* 169 U.S. 284 at 291 (habeas corpus).

B. The opinion of the majority fosters a rude clash between jurisdictions by permitting the release of a prisoner in state custody. The doctrine of comity was designed to avoid such conflict.

The majority opinion states:

"Appellant argues that the state court does have jurisdiction to try appellee while he is a federal probationer *unless* the federal court or appropriate federal authorities object to exercise of state jurisdiction over the accused."

It has been, and is, the view of the petitioner that the second Court, in this case the State Court, having jurisdiction of the person, may proceed unless there is an objection on behalf of the Federal Court, *which is made in the State Court.* Only then must the second Court, as a matter of comity, decline to exercise its jurisdiction.

At the core of our contention lies the question of consent and the manner and procedure by which the first sovereign may enter its objection. We contend that the second Court has the right to assume consent in the absence of an express objection by the first sovereign in the tribunal of the second sovereign.

The rule of comity which requires the objection to the jurisdiction of the second Court to be made in

the second Court, and which leaves to the second Court the power to decline to exercise its jurisdiction, was designed to prevent the very thing which occurred in the present case. The rule of comity was designed to promote conciliation and harmony, rather than alienation and discord between tribunals. The requirement that the objection by the first sovereign be made in the tribunal of the second sovereign operates to bring about this harmony in two ways: (1) It gives the second sovereign the right to pass upon the question of whether it should decline as a matter of comity to exercise its jurisdiction; and (2) It prevents the preemptory release of the prisoner of the second sovereign by the first sovereign.

However, in the present case no objection by the Federal Court or representative of the Federal Court was ever made in the State Court.

Likewise, the majority opinion leaves unsolved the problem of assumed consent and gives the State Courts no guidance among conflicting federal cases on this question. It has been petitioner's view that the District Court was incorrect in refusing to give any consideration to the fact that the federal government had not entered an objection *in the State Court* to the state's exercise of jurisdiction over the prisoner. We have urged the view followed by the Second Circuit. The case of *U. S. ex rel. Pasela v. Fenno*, 167 F. 2d 593, 596, held that in the absence of an objection expressed by the first jurisdiction in the tribunal of the second jurisdiction the second jurisdiction may assume the consent of the first jurisdiction. Such a

rule is a common sense element of the rule of comity involved in the present case. Any other rule would compel the state to inquire whether each prisoner is a federal probationer; in view of the enormous number of prosecutions in State Courts every year the administrative burden of such a requirement would be enormous. The rule of comity permits, and common sense demands, that the second jurisdiction assume the consent of the first jurisdiction in the absence of an express objection by the first jurisdiction in the tribunal of the second jurisdiction.

C. The opinion of the Court of Appeals seemingly creates ambulatory enclaves out of all federal probationers.

If the majority opinion is based on the ground that the state lacks jurisdiction over a probationer, it has created ambulatory enclaves who are free from any detention by state officers acting as state officers, including detention incident to arrest for any crime against the people of the state. The majority opinion states that the same result obtains, either on the theory of comity between Federal and State Courts, or on the theory of federal supremacy. The latter theory would effectively deprive the state and any of its officers from enforcing any of its laws against a federal probationer. For if the lower State Court is without jurisdiction and the sheriff in the instant case is powerless to detain the probationer, then all state officers are powerless to prevent and to detain any probationer for violating any state law, since probationer is in *custodia legis* of the Court of the United States. Such a result is neither desirable nor neces-

sary. The majority opinion is in conflict with numerous other decisions which disclaim the theory that the State Court is without jurisdiction in the present situation:

In the case of *U. S. ex rel. Pasela v. Fenno*, 167 F. 2d 593, the Second Circuit expressly declined to follow the holding of decision of *Grant v. Guernsey* (10th Cir.), 53 F. 2d 163, insofar as it held that the second Court, assuming jurisdiction, lacks jurisdiction. To like effect is the case of *U. S. ex rel. Spellman v. Murphy* (7th Cir., 1954) 217 Fed. 2d 247. Also see, *Hebert v. Louisiana*, 272 U.S. 312, 315; *Werntz v. Looney* (10th Cir.), 208 F. 2d 102; *Rahls v. U. S.* (10th Cir.), 166 F. 2d 532; *U. S. v. Farrell*, (8th Cir.), 87 F. 2d 957; *People ex rel. McCarthy v. Reagan*, 58 N.E. 2d 872 (389 Ill. 172); *Wilkinson v. Youell*, 23 S.E. 2d 356 (180 Pa. 321).

The majority opinion apparently concedes that the State Court is not without jurisdiction unless the federal authorities object. It should appear clear that the state, according to the present case, has jurisdiction since no objection has been made to its jurisdiction in its tribunal. We have pointed out above the discord and the disorderly state of affairs created by the use of the writ of habeas corpus to enforce such a rule prior to any objection by an agent of the federal government made in the State Court.

The U. S. Court of Appeals in an attempt to justify the use of a writ of habeas corpus has relied on the case of *In re Neagle*, 135 U.S. 1. The rationale of that decision is that the marshal was an instrumen-

tality and agent of the federal government. It is hoped that by this citation the majority is not making the probationer an instrument or agent of the federal government.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be granted in order that this Court may settle important questions concerning federal-state relations which have received different treatment by different U. S. Courts of Appeal.

Dated, San Francisco, California,
September 12, 1956.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Petitioner.

(Appendices A and B Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Bert Strand, Sheriff of San Diego County, State of California, Appellant, vs. William Schmittroth, Appellee.	No. 14,733 May 3, 1956

Appeal from the United States District Court for the Southern District of California Southern Division.

Before: Healy, Bone and Chambers, Circuit Judges

Bone, Circuit Judge.

I.

On September 15, 1953, a complaint captioned "The People of the State of California, plaintiff, vs. William Roth, defendant," was lodged in the court of the Municipal Court, San Diego Judicial District, County of San Diego, State of California. It charged the said Roth with the commission of a felony, to wit, uttering and passing a check bearing a fictitious name with intent to cheat and defraud certain California persons named in the complaint. Complainant prayed that a warrant issue for Roth's arrest.

Sometime in January, 1955, Roth (appellee herein) was apprehended and delivered to the custody of the San Diego Police Department on a warrant issued by the San Diego authorities. A preliminary hearing was set for and held on February 10, 1955 in the Municipal Court of San Diego Judicial District. The preliminary examination was held in the Municipal Court which determined that there was reasonable cause to believe that Roth (whose true name appears to be Schmittroth) had committed an offense against the State of California, and ordered him held in custody of appellant sheriff pending further proceedings. Appellee raised the question of State court jurisdiction over him (for reasons noted below) but his objection was overruled by the Municipal Court.

On February 8, 1955, appellee Schmittroth filed a petition for a writ of habeas corpus in the United States District Court, San Diego, this to secure freedom from detention by appellant.

The records before us indicate that in January, 1955, appellee had entered a plea of guilty in a criminal case then pending in the above named United States District Court the charge against him being the offense of transporting a false security in interstate commerce, a federal crime he had committed in Florida. Upon his plea, and on January 17, 1955, Judge Carter, the District Judge then sitting, sentenced Schmittroth to ten years confinement. Execution of this sentence appears to have been suspended and appellee was placed on five years probation by Judge Carter. 18 U.S.C.A. § 3651.

On February 9, 1955, the District Judge of the United States Court ordered appellant to show cause on February 17, 1955 why a writ of habeas corpus should not issue on appellee's petition and appellee be discharged from confinement by appellant. On February 11, 1955, appellant filed an answer to Schmittroth's petition.

On February 17, 1955, a hearing was held in the lower court on appellee's petition for the writ and appellant's answer thereto. On that day the lower court issued and filed an "order for discharge" which directed that Schmittroth be "forthwith discharged from further imprisonment and detention by reason of the said commitment issued by the Municipal Court, San Diego Judicial District, County of San Diego, State of California." The lower court did not make findings of fact and conclusions of law to accompany this order. Under this order appellee Schmittroth was discharged from imprisonment and detention by appellant.

On February 21, 1955, appellant filed a petition for a rehearing. The lower court denied this petition by order dated February 24, 1955.

The record of the hearing on February 17, 1955 (the only hearing held) is illuminating in that it serves to indicate the attitude of the court and both parties as to the *finality* which might possibly attach to the court's order of discharge dated and filed on that day. Colloquy between Judge Hall and counsel in open court shows that the parties were advised by the Judge that appellee was entitled to the writ he sought;

that it was the opinion of the court that counsel for appellee "had better have findings of fact here in this matter which can follow from this order," i.e., the order of discharge entered that day. On this note the proceedings ended.

Contrary to what appellee suggests in his brief we think that this record sustains the view that the discussion in open court on February 17, 1955 makes abundantly plain that counsel for both parties (neither of whom made any objection to the court's suggestion) did not regard the making and entry of findings of fact and conclusions of law in the case at a later date as a meaningless gesture by the court. Respecting this procedure we quote in the margin the colloquy above referred to.[1]

It was pursuant to this unopposed suggestion that Judge Hall did later make and enter a formal judgment supported by findings.[2] This procedure was in

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[1]The Court: "I think perhaps that you had better have findings of fact here in this matter which you can follow from this order. • • • However, in your findings of fact why you can incorporate, if you wish, this whole record." • • •

The Court: "It is your lawsuit. If you want to put it in [letter from Chief of United States Probation officer showing that there was no consent granted by that office, and there had not been a request made], why, you may offer it."

Without objection from counsel for appellant the lower court received this letter in evidence to supplement the hearing record.

The Court: "• • • Now, the original file in this habeas corpus proceeding is a little scrambled up."

[2]The lower court found, inter alia, that all of the allegations of fact in Schmittroth's petition for a writ of habeas corpus were true; that he was on probation to the United States District Court for the Southern District of California for five years, commencing January 17, 1955; that no consent to prosecute or incarcerate him was ever obtained from the United States by the State of California; that the United States District Court for the Southern

conformity with his earlier suggestion concerning the *desirability* of entering findings in the case at some subsequent date. Appellant contends that, on the record, "the Court did not intend its 'minute order' of February 17, 1955, to be final in any sense." We agree with this view of the record.

From the whole record we think it clearly indicates that the trial court *intended to retain jurisdiction of the proceedings for further judicial consideration after entering the discharge order of February 17, 1955.* In our view, this sort of proceeding not only served the ends of justice but was well within the orbit of judicial discretion. The end result was the preparation and filing, on March 11, 1955, of formal findings of fact, conclusions of law, and a judgment. The judgment was in harmony with the earlier "order of discharge" dated February 17, 1955.

On April 1, 1955 and upon application of the Attorney General of the State of California (appearing as counsel for appellant) the lower court issued a "Certificate of Probable Cause" in which it briefly recited,

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District of California had not consented to his prosecution by the State of California for offenses allegedly committed by him *prior* to the date he was placed on probation by the United States District Court for the Southern District of California.

Upon these facts the court concluded, inter alia, that appellee had the right to petition for a writ of habeas corpus to question the legality of his confinement by the State of California; that he was incarcerated by the State of California without any jurisdiction over his body in violation of his constitutional rights that appellee was in the exclusive jurisdiction of the United States, subject to the orders of the United States Probation Department, for the duration of his probation; that he was entitled to an order of the Court discharging him forthwith from the custody of respondent (sheriff).

inter alia, that probable cause existed for an appeal "from the *orders* and judgment of this Court granting the Writ of Habeas Corpus and ordering petitioner released from custody in the above entitled matter." (Emphasis supplied.)

On March 16, 1955, appellant gave formal "Notice of Appeal" the text of which appears in the margin.[3] The text of this notice shows that appellant was endeavoring to appeal from *both* of the orders and/or judgments here noted, and involved on this appeal.

APPELLEE'S POSITION

On this appeal appellee vigorously contends that the February 17, 1955 "order for discharge" was a final and appealable order in the habeas corpus proceeding which fully terminated the controversy; that findings and conclusions "are not required in habeas corpus proceedings" (under Civil Rule 52) since "they add nothing to the [this] order." His claim is that findings in connection with this order were not necessary to give it full force and validity; that since it was *the* final and appealable order in the case this Court has no jurisdiction to entertain the instant appeal since it was not timely "perfected" and is therefore fatally

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[3] "Notice is hereby given that Bert Strand, Respondent above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order granting a Writ of Habeas Corpus to the Petitioner herein, dated the 18th day of February, 1955, and from the judgment granting a Writ of Habeas Corpus to the above-named Petitioner, dated March 11, 1955.

Dated: March 16, 1955."

defective *as against the aforesaid February 17, 1955 "final" order,* this for reasons we note below.

On this jurisdictional issue appellee's specific argument is that appellant did not secure the (above noted) certificate of probable cause required by 28 U.S.C.A. § 2253 *within* thirty days from and after entry of the February 17, 1955 order and judgment of discharge hence the attempt to appeal from that order necessarily fails. This certificate was issued by Judge Hall approximately 41 days after entry of the February 17, 1955 "order for discharge," and approximately 35 days *after* the order denying a rehearing on that order. [Under appellee's theory, the appeal from the judgment of March 11, 1955 would have no legal significance and should be disregarded.] In short, appellee's position is that there is no appeal properly before us in this case and the purported appeal should be dismissed for lack of jurisdiction.

Where detention arises (as here) out of process issued by a state court, it has been held by several Circuits that application for or obtaining the certificate of probable cause within 30 days (the time allowed by Rule 73 (a) of the Federal Rules of Civil Procedure for taking an appeal) from and after an appealable order is entered, is prerequisite to our appellate jurisdiction.[4]

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[4]Boyden v. Webb, 208 F.2d 201, 9 Cir., 1953; Ex parte Farrell, 189 F.2d 540, 1 Cir., 1951; United States ex rel. Carey v. Keeper of Montgomery County Prison, 202 F.2d 267, 3 Cir., 1953, cert. den. 345 U.S. 930, 1953; United States ex rel. Kreuter v. Baldwin, 49 F.2d 262, 7 Cir., 1931. 28 U.S.C.A. §§ 2107, 2253.

In the light of these various Circuit holdings on this jurisdictional question we face the necessity of determining which one of the two orders and/or judgments here considered constitutes the final and appealable order entered in this case. Is it the order of discharge dated February 17, 1955 (or, in the alternative, the denial of the above noted petition for rehearing on February 24, 1955) or is it the second order and judgment filed and entered March 11, 1955? If the order of February 17, 1955 was a final and appealable order, (or in the alternative, if the denial of a rehearing can be said to be the "final order" in the case) *then* the appeal here attempted to be taken from either of these two earlier orders and/or judgments was not "perfected" within the allowable thirty day period from and after date of their entry because more than 30 days had elapsed between the entry of both orders and the filing and entry of the certificate of probable cause.

However, the certificate of probable cause for appeal from the later judgment of March 11, 1955 was obtained *within* the necessary thirty days from and after entry of that judgment. If it must be regarded as the final and appealable order in this case, it is clear from the record that the notice of appeal given in this case (which also includes appeal from the February 17th order) was timely filed and has been "perfected."

In light of all of the facts and the sequence of events we have noted, we conclude that the jugdment of March 11, 1955 was the final and therefore the

appealable order. We think that the fact that appellant may have made a futile attempt to (also) appeal from the order of February 17, 1955 (Footnote 3) is not a jurisdictional bar to entertaining a timely appeal from the judgment of March 11, 1955 which rests upon formal findings and conclusions. In this view of the case, and because findings of fact were filed to support what we here hold was the final and appealable order, it is not necessary here to decide whether findings and conclusions are required to support a judgment in a habeas corpus proceeding.

For the reasons above stated, we hold that the contention of appellee that this Court has no jurisdiction of the instant appeal is without merit. We also hold that the "order for discharge" entered on February 17, 1955 was not the final order from which to perfect an appeal, and that the aforesaid certificate of probable cause was timely procured. Hence, this Court has jurisdiction to entertain the instant appeal, 28 U.S.C.A. § 2253.

II.

Further issues are tendered by appellant. He urges that under "the rule of comity" the Court first acquiring jurisdiction of the person of a criminal is entitled to retain him in custody until he has finished his sentence; that the facts shown in this case do not affect the jurisdiction of the State of California to retain custody of appellee; that application of the rule of comity in no way affects any personal or constitutional right residing in him. In short, regardless

of *how* appellee's presence in the State court was secured, and regardless of the rule of comity, he was afforded full opportunity to defend against the State charge. Appellant supports this argument with a citation of cases.[5]

Appellant also challenges the power of the lower court (under Section 2241 of Title 28 United State Code) to grant the instant writ of habeas corpus. His point is that *if* the lower court "purported to deny the consent to the State's jurisdiction the court abused its discretion in its failure to *consent* to the State's jurisdiction." He urges that where (as here) the State authorities had actual possession of appellee and were affording him full right to present a defense, including the right of the Federal Government to enter an objection on the basis of the rule of comity concerning first acquired jurisdiction, the State court has jurisdiction. In light of this situation, and under the rule of comity, the proceedings of the State authorities affected no right or immunity granted appellee by the Constitution, laws or treaties of the United States. Appellant cites cases in support of this argument.[6]

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[5]Hebert v. Louisiana, 272 U.S. 312, 315; Ponzi v. Fessenden, 258 U.S. 254; Stamphill v. Johnston, 136 F.2d 291, 9 Cir.; Werntz v. Looney, 208 F.2d 102, 10 Cir.; United States v. Fenno, 167 F.2d 593, 595, 2 Cir.; Rawls v. United States, 166 F.2d 532, 10 Cir.; United States v. Farrell, 87 F.2d 957, 8 Cir.; People ex rel. McCarthy v. Regan, 58 N.E.2d 872 (389 Ill. 172); Wilkinson v. Youell, 23 S.E.2d 356 (180 Pa. 321).

[6]Morse v. United States, 267 U.S. 80, 82; Stamphill v. Johnston, 136 F.2d 291, 293, 9 Cir.; Werntz v. Looney, 208 F.2d 102, 104, 10 Cir.; United States v. Farrell, 87 F.2d 957, 8 Cir.

Appellant also argues that a writ of habeas corpus is not the proper remedy or procedure to review the application or failure to apply the rule of comity in the second (state) court acquiring jurisdiction. He supports this contention with citation of cases.[7]

These questions are considered below and discussed in light of cases which appear to be relevant.

A leading case on identical facts is Grant v. Guernsey, 63 F.2d 163, 10 Cir., 1933, cert. den. 279 U.S. 744, 1935. In the Guernsey case the petitioner was convicted of a federal offense, but sentence was suspended and petitioner placed on probation. Later, the state authorities charged petitioner with a state criminal offense committed prior to the federal sentence. Petitioner sought in the Federal District Court a writ of habeas corpus which was issued. On appeal, the Circuit Court of Appeals affirmed, saying the state action was "a direct interference with federal jurisdiction, and a violation of the rule of comity between federal and state courts." (At p. 164.)

Since the Guernsey case many decisions[8] have either

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[7]Morse v. United States, 267 U.S. 80, 82; Stamphill v. Johnston, 136 F.2d 291, 292, 9 Cir.; United States v. Marrin, 170 Fed. 476, 479-480.

[8]*E.g.*, Wall v. Hudspeth, 108 F.2d 865, 10 Cir., 1940; Lunsford v. Hudspeth, 126 F.2d 653, 10 Cir., 1942; United States ex rel. Speece v. Toman, 23 F. Supp. 119 (N.D. Ill. 1938); United States v. Robinson, 74 F. Supp. 427 (W.D. Ark. 1947); Wing v. Stewart, 77 F. Supp. 257 (W.D. Mo. 1948); United States ex rel. Hall v. McGowan, 80 F. Supp. 792 (D. Minn. 1948); United States v. Mierzanka, 89 F. Supp. 573 (W.D. Mich. 1949). *Cf.* Lu Woy Hung v. Haff, 78 F.2d 836, 9 Cir., 1935 (deportation of paroled state prisoner); Ex parte Vasquez, 122 F. Supp. 160 (N.D. Cal. 1954) (deportation of federal probationer). *Cf.* Beavers v. Haubert, 198 U.S. 77, 1905; Peckham v. Henkel, 216 U.S. 483, 1910;

applied the rule, or recognized the rule but grounded the decision upon other factors.

"Despite the wide adherence to the rule of the Guernsey case, supra, some courts have expressly refused to follow it. In United States ex rel. Pasela v. Fenno, 167 F.2d 593, 595, 2 Cir., 1948,[9] the Court stated, 'We understand the Guernsey case to hold that the second [state] court, purportedly assuming jurisdiction, is entirely lacking in it. * * * If this is the holding of that decision, we decline to follow it.' United States of America ex rel. Spellman, Jr. v. Murphy, 217 F. 2d 247, 7 Cir., 1954, reached the result announced in the Pasela case." Both cases involved *federal probationers* subsequently charged before other courts, one a Naval court-martial, the other before a state court.

Appellee here argues that the California court was lacking in jurisdiction for the reason that he was on probation granted by the lower court the consent of which court to his trial in the State court was not sought or obtained at any time. However, appellant argues that the State court does have jurisdiction to try appellee while he is a federal probationer *unless* the federal court *or* appropriate federal authorities object to exercise of state jurisdiction over the accused.

United States v. Binion, 13 F.R.D. 238 (D. Nev. 1952), appeal dismissed, 201 F.2d 498, 9 Cir., 1953, cert. den. 345 U.S. 935, 1953 (removal of defendant from one district to another, being charged with crimes in both districts).

[9]Cert. grant. 334 U.S. 857, 1948, but dismissed by stipulation of counsel, 335 U.S. 806, 1948. The Circuit Court opinion affirmed the District Court, 76 F. Supp. 203 (D. Conn. 1947).

It is conceivable that certain statements of the Supreme Court may be susceptible of the meaning that the state court lacks jurisdiction in this case.[10] In Ableman v. Booth, 21 How. 506, 1859, and Tarble's Case, 13 Wall. 397, 1872, state courts were attempting to release, by issuance of writs of habeas corpus, prisoners who were then confined by federal authorities. In Ponzi v. Fessenden, 258 U.S. 254, 1922, the accused was in prison following conviction in a federal court when the State sought, by writ of habeas corpus, to bring the prisoner before a state court in order to there prosecute him for crimes against the State. It was in such circumstances that the Supreme Court spoke in general terms of lack of jurisdiction in the State court. *Cf.* Covell v. Heyman, 111 U.S. 176, 1884, where a specific res was involved.

We believe that the facts of this case are distinguishable. Here Schmittroth was arrested by the California authorities and was personally before the State court. At the time of the State arrest he had freedom of movement within the State, subject only to certain limitations in the order of the federal probation officer

[10]Mr. Chief Justice Taft, in Ponzi v. Fessenden, 258 U.S. 254, 1922, at p. 260, stated:
"The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose."
Compare Ponzi v. Fessenden, supra, with Morse v. United States, 267 U.S. 80, 82, 1925, "The principle that when the jurisdiction of a court has attached, it must be respected as exclusive until exhausted, is a rule of comity having a wide application in civil cases but a limited one in criminal cases."

and the district court (such as to stay away from cities, etc.), and subject also to the requirement that the probationer report to the chief probation officer once a month.

It has long been the rule in criminal prosecutions that if the accused is personally before a court having jurisdiction of the subject matter, that court has jurisdiction over the accused regardless of how the accused was brought into the presence of the court.[11]

It seems rational to conclude that when a case arises like the one now before us, the state court does have jurisdiction to try the accused (assuming the due process requirements for existence of jurisdiction are met) but that when the federal court (or federal authorities as the case may be) *object* to its exercise of jurisdiction, the state must relinquish its jurisdiction until a future time, i.e., when the federal jurisdiction (here the period of probation) is at an end, *or* the federal court (or authorities) have expressed *consent* that the state may exercise its power. Hebert v. Louisiana, 272 U.S. 312, 1926; Florio v. Edwards,

[11]Ker v. Illinois, 119 U.S. 436, 1886 (kidnapped in Peru and brought before an Illinois court); Mahon v. Justice, 127 U.S. 700, 1888 (seized by armed men in West Virginia and taken to Kentucky); Pettibone v. Nichols, 203 U.S. 192, 1906 (kidnapped in Colorado and taken to Idaho for trial); Moyer v. Nichols, Haywood v. Nichols, 203 U.S. 221, 1906. Many state citations are listed in Pettibone v. Nichols, at p. 215. Additional federal cases are In re Johnson, 167 U.S. 120, 1897 (illegal arrest); Malone v. United States, 67 F.2d 339, 9 Cir., 1933 (premature arrest); United States ex rel. Voight v. Tooms, 67 F.2d 744, 5 Cir., 1933 (wrongful seizure beyond territorial jurisdiction of court); Cardigan v. Biddle, 10 F.2d 444, 8 Cir., 1925 (fugitive from justice surrendered on request of another state may be tried in demanding state for crimes other than the one for which he was surrendered).

80 F.2d 509, 5 Cir., 1936; United States ex rel. Pasela v. Fenno, supra; United States ex rel. Spellman, Jr. v. Murphy, supra.

It seems to us that in the instant case the federal court, by issuance of its writ of habeas corpus, has clearly expressed *its objection* to exercise by a state court of its criminal jurisdiction over the federal probationer at this time. Applying this rule, the State must postpone exercise of its criminal jurisdiction, either on the theory of comity between federal and state courts, or on the theory of federal supremacy. Ponzi v. Fessenden, supra; Covell v. Heyman, supra; Tarble's Case, supra. Since here the federal court has clearly expressed disapproval of the California court's action, we need not discuss any theories of assumed consent. Hebert v. Louisiana, supra.

No prior case decided by this Court appears to be in conflict with the views here expressed. The principal Ninth Circuit case is Stamphill v. Johnston, 136 F.2d 291, 9 Cir., 1943, cert. den. 320 U.S. 766, where the facts were the reverse of those in the case before us.[12] In that case the State of Oklahoma first

[12]Throughout this opinion we have generally used the terms "federal court" and "state court" rather than to write in terms of "the first court to exercise jurisdiction" and "the second court to take jurisdiction." While this was done for facility of expression, the cases indicate that the same rules apply where a state court first takes jurisdiction and the federal court proceeding commences thereafter. Zerbst v. McPike, 97 F.2d 253, 5 Cir., 1938; Rosenthal v. Hunter, 164 F.2d 949, 10 Cir., 1947. However, state authority is apparently subject to whatever judicial process "may be necessary on the part of the national government to preserve its rightful supremacy in cases of conflict of authority." Tarble's Case, supra, p. 407.

acquired jurisdiction over Stamphill, but later voluntarily surrendered the accused (out of its penitentiary) to the United States for trial in an Oklahoma federal district court. (When the Stamphill habeas corpus proceeding was before this Court, Stamphill was confined in the federal penitentiary at Alcatraz serving the Oklahoma federal sentence.) In our opinion we referred to Ponzi v. Fessenden, supra, and Ableman v. Booth, supra, and stated, "However, the defendant was brought before the District Court, once he was there *it had and was bound to exercise complete jurisdiction over him.*" (At p. 292, emphasis supplied.)[13]

There is no doubt that permission may be granted to the state. In Ponzi v. Fessenden, supra, the court was primarily concerned with the question of consent. The Supreme Court held that the federal attorney-general or his representative was qualified to consent that a federal prisoner be taken before the state court for trial.

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[13]In re Fox, 51 Fed. 427, N.D. Cal. 1892, stated that a federal prisoner on bail could be arrested and prosecuted by California unless federal authorities objected. Express consent to state prosecution was found in Cato v. Smith, 104 F.2d 885, 9 Cir., 1939, cert. den. 308 U.S. 608, 1939; United States ex rel. Moore v. Traeger, 44 F.2d 312, 9 Cir., 1930; and state consent to federal incarceration in Kirk v. Squier, 150 F.2d 3, 9 Cir., 1945, cert. den. 326 U.S. 775, 1945. Johnston v. Wright, 137 F.2d 914, 9 Cir., 1943, was decided upon other grounds, and the Court found insufficient evidence of prior state jurisdiction to pass upon the question in Vane v. United States, 254 Fed. 28, 9 Cir., 1918. While this list of cases exceeds the number of cases from this Circuit cited to us by counsel, it is not intended to be an exhaustive compilation of cases on this problem.

III.

If the state court does have jurisdiction, but will decline to exercise it *if* the federal court makes objection, we are confronted with this question: Does appellee have standing to raise the question of exercise of state court jurisdiction over him. Appellant argues that *only* the federal court or authorities may raise such an issue.[14] Appellee argues that the accused may raise the question.

It should be noted that in Stamphill v. Johnston, supra, we said (at p. 292):

> "* * * The arrangement made between the two sovereigns, the state and federal governments, does not concern the defendant who has violated the laws of each sovereignty *and he cannot in his own right demand priority for the judgment of either.*"[15] (Emphasis supplied.)

We still adhere to the view there expressed that an accused has no standing to dispute arrangements which may be made between sovereigns when he has violated the laws of both. But we also believe that the accused has a right, in some manner, to bring to

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[14]From the record it appears that this question may be moot, as appellant seems to have conceded in the lower court that the accused may not raise the question in the second court (State here), but may raise it only in the first court (Federal Court here), if at all. Since a waiver is not readily found, and since the statement of appellant could be considered an attempted explanation of cases rather than an admission, we will give consideration to this question.

[15]Other cases state this rule. *E.g.*, Ponzi v. Fessenden, supra; Morse v. United States, 267 U.S. 80, 1925; Rawls v. United States, 166 F.2d 532, 10 Cir., 1948; Stripling v. United States, 172 F.2d 636, 10 Cir., 1949; Powell v. Sanford, 156 F.2d 355, 5 Cir., 1946; Kirk v. Squier, supra.

the attention of the court first taking jurisdiction over him (here the lower court) the fact that proceedings have been started against him in a state court.[16] Once notice of the proceeding in the state court is brought to the federal court's attention, whatever interest or standing the accused may have is at an end, and it is for the federal court to then decide whether the state court's proceeding infringes upon, or interferes with, the jurisdiction of the federal court. In short, the accused has no control over the federal sovereign as to whether it will, or will not, consent to exercise of state jurisdiction over him.

In the case at bar we believe that the petition for a writ of habeas corpus was a suitable method by which appellee could bring before the lower court the fact of the pending proceeding against him in the California court. Here, the lower court issued the writ, thus indicating its intention that orderly administration of justice required that its jurisdiction over appellee should not be disturbed and should remain exclusive during the period of his probation. Had appellee's writ been denied, there would have been no obstacle to the state proceeding against appellee.

We are not intimating that (as here) a petition for a writ of habeas corpus, followed by the court's ruling thereon, is the sole and only procedure by which the

[16] Or, in the words of the District Judge below: "I cannot believe that the right does not lodge in the individual because it is his liberty that is involved, *while at the same time he has no control over the sovereign as to whether or not they will consent.* But, nevertheless, if they have not consented it seems to me that it is his liberty that is involved and he has the right to bring the petition." (Emphasis supplied.)

lower court could protect its jurisdiction. There may be other equally satisfactory methods by which to inform the lower court of pending state court proceedings. It is sufficient to say that in the instant case appellee's petition for a writ of habeas corpus did afford an appropriate and expedient method by which to bring the fact of state court proceeding to the attention of the lower court, and that issuance of the writ was within the power of the lower court.[17]

In his dissent, Judge Chambers has discussed hypothetical situations which might possibly give rise to a jurisdictional conflict between state and federal courts over the right of either sovereignty to apprehend and/or proceed to prosecute a person then at large under a grant of probation from one or the other of such courts, but we think that his concern is not justified by the specific facts before us. Conceding that abuse of the privilege of the writ by state prisoners appealing to federal courts has approached farcical proportions, we cannot conclude that the im-

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[17] In re Neagle, 135 U.S. 1, 1890; Ex parte Robinson, 6 McLean 355, C.C. 1855, apparently indicate that the Judiciary Act empowers the federal courts to issue a writ of *habeas corpus* to protect validly acquired federal jurisdiction. *Cf.* Mr. Chief Justice Hughes in Bowen v. Johnston, 306 U.S. 19, 26-27, 1939: "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. • • • But it is equally true that the rule [requiring resort to appellate procedure when the trial court has determined its own jurisdiction] is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent. Among these exceptional circumstances are those indicating a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions. [Cases cited.]"

portant issue here tendered is of the frivolous nature characteristic of so many applications. In any event, this case poses an issue in the administration of law worthy of consideration. Attention is called to an article in the publication "Federal Probation" for March, 1956, page 54, commenting on the case at bar.

The court below pointed out (and held) that it was not destroying the jurisdiction of the State Court, and we quote in the margin its pertinent comments on this issue.[18]

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[18]"So the matter comes down to two questions: whether or not the person himself can raise the question of jurisdiction or whether or not the sovereign can. I hold that the person can.

"It comes down to whether or not there must be a consent [here from the Federal court granting probation] or whether or not mere failure to object is consent, and under the case of Grant v. Guernsey—which, incidentally, relies upon the old case of Taylor v. Tainter in 16 Wallace—there must be an affirmative act of consent either by delivery or, as in Ponzie v. Feddington [Ponsi v. Fessenden], where the Attorney General consented, or there must be some conduct by which the consent can be implied. In other words, there must be an actual or an implied consent rather than a mere failure to object. I hold that there must be a consent, that there has been no consent in this case, and under Grant v. Guernsey the petitioner is entitled to the writ. In doing that, I do not think that I am destroying the jurisdiction of the State; I am merely delaying it because, as I view the State's statutes, you can preserve your jurisdiction and preserve the statute of limitations over this defendant by causing him to be indicted by your [State] grand jury and merely holding that indictment until the expiration of the term of his [Federal] probation. If, for instance, on the last day of his probation he were to kite another check he could be brought before Judge Carter [the Federal Judge granting probation] and right then he would begin to serve his [Federal] sentence of 10 years, 10 years from that date, and not 10 years from the date of the judgment. So the defendant here has hanging over him a pretty heavy sword by a very slender thread, and if you [State] should indict him he will have two swords hanging over him. But I will hold that the petitioner is entitled to the grant of the writ and hope that the County of San Diego will take it up to the Ninth Circuit and let them settle in this District whether or not

For the reasons here stated, the judgment of the District Court is affirmed.

Chambers, Circuit Judge, dissenting:

I cannot accept the conclusion that the United States District Court for the Southern District of California was correct in ordering the California state sheriff of San Diego County to release the prisoner because he was "insulated" with an impenetrable coat of immunity: federal probation.

When federal courts grant habeas corpus petitions for state prisoners after conviction in a state court (I mean: due process habeas corpus), the federal courts are exercising what our Supreme Court holds

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it is a failure to object or whether or not it must be a consent, expressed or implied, and clarify their statements about the right of the individual to bring the petition. I cannot believe that the right does not lodge in the individual because it is his liberty that is involved, while at the same tme he has no control over the sovereign as to whether or not they will consent. But, nevertheless, if they have not consented, it seems to me that it is his liberty that is involved and he has the right to bring the petition."

After the foregoing expression of views by the lower court, the Deputy District Attorney for San Diego County announced to the court that he had "come to this conclusion, that when they say the defendant cannot raise the question they mean by that that he cannot raise the question in the second [State] sovereignty." The lower court agreed with him that appellee in this case could not raise such a question in the State Court. Counsel for the State also agreed that appellee could raise the question of jurisdiction in the lower court "because who else could? It seems, as your Honor has said, obvious that the defendant must be able to protect himself, and if he can raise the question at all he ought to be able to raise it in the court that could do him some good." Counsel for the State also agreed with the lower court that it was the only court where appellee could raise the question—that "the first sovereignty [Federal] must raise it in the second sovereignty, but the defendant may raise it in the first sovereignty, the way I look at it."

is a paramount right and duty of the judicial system of the sovereignty of the United States itself. Much different is the variety of habeas corpus we have here. If the federal court in San Diego can say to the state sheriff of San Diego County, "Don't touch our probationers without our consent", then an inescapable corollary is that a state prisoner, arrested by federal agents and indicted by a federal grand jury, can rush into his state court, sue out a writ of habeas corpus and get a state order to the United States marshal of the Southern District of California commanding the release of the state probationer.

And in this competitive field of judicial intermeddling I am sure that the states will come off best. I believe it can be proved (I have no statistics, but it is my observation) that the percentage of first offenders before the bar of justice runs higher in the state courts than in the federal courts. Consequently, the occasion for state interference will be higher percentage-wise. And it distresses me to think of all the state probationers that are here and now removed from prosecution in the federal courts except by the grace of the state courts.

Suppose a state probationer violates the federal kidnapping statute. The Federal Bureau of Investigation finds the kidnapper. Can its officers arrest the culprit? Must they get the permission of a state judge to arrest him? If they can arrest him but must get permission to prosecute, how long can they hold the kidnapper while they wait for permission? If the judge who hears the habeas corpus decides that the

other jurisdiction (by grace of his discretion) should prosecute, then may the prisoner appeal, claiming an abuse of discretion?

I think of the huge number of juveniles throughout the country who are "probationers" of state juvenile courts. Can a juvenile state probationer go out, rob a national bank, get caught by the Federal Bureau of Investigation and then taunt his arrestor with, "You can't arrest me. You can't prosecute me. My juvenile judge said you couldn't touch me."

It is not inconceivable that certain people may accept the invitation we issue here, go out, shop for a friendly state court, commit some minor offense, get themselves on probation, and then venture forth to violate federal statutes with their state cloaks of immunity wrapped about them.

Apparently, part of the court's opinion is grounded on the fact that the state offense here was committed before the federal offense was committed. Also, the decision seems to be bottomed in part on the circumstance that San Diego County, the state jurisdiction, is wholly within the United States District of Southern California. The questions which will follow are not here for determination, but surely we must stop and think the matter through. Will we deny the great writ to one who commits the state offense after he goes on federal probation but grant it if his state offense precedes his federal offense in point of time? How can a logical distinction in the foregoing instances be made in terms of a court's inherent power to proceed?

Suppose the federal probation is at San Diego and the subsequent state offense and arrest are in Alameda County, California, in the Northern District of California. The application for habeas corpus must be made in the United States District Court for the Northern District. How will that work? Will a judge of the federal court in the Northern District exercise the Southern District's (the court which put the prisoner on probation) discretion as to whether state prosecution should go ahead?

At our request, the United States was invited to appear herein and state its views. As a consequence, the United States attorney for the Southern District appears and files as a friend of the court a brief upholding the prisoner's (Schmittroth's) position. It will be interesting to read his brief when the Superior Court of San Diego, California, grants an order on habeas corpus releasing from the custody of the United States marshal of the Southern District of California a prisoner awaiting trial for some serious federal crime. Where will the district attorney stand then? In this two-way street, how can he assert the right of the federal government to meddle and deny the right to the state.*

The only authority squarely in point is the two-to-one Tenth Circuit case of Grant v. Guernsey, 63 F.2d

*While much is said in the within opinion to the effect that the federal courts cannot claim a right to interfere with prosecution by states of federal probationers, without at the same time granting a similar right to states when the situation is reversed, this opinion is not based on such a narrow ground. Because if it is good for federal courts to stop state prosecutions, it is good for states to stop federal prosecutions.

163. There the majority's reason does not appeal to me and there is nothing yet that compels this court to follow it, if reason be absent from it. I would disregard it.

In the field in which we are working, we have the matter of adjusting and accommodating a dual system of courts sitting side by side in a field. Most of our rules on "who gets the prisoner" have been worked out on a basis of comity. I do not regard the rule that the governmental jurisdictional entity which first arrests a prisoner (that is, of course, one not on probation), who is wanted by two jurisdictions, may proceed to vindicate its authority first as a rule based on concepts of fundamental power. I think the rules are based on comity, that is, upon considerations of what is orderly, what will cause the least friction. I do not think such a rule is one of "jurisdiction" in the fulsome sense of power. True, as rules are expressed over and over again, it is easy to attach the word "jurisdiction." Similarly, a prisoner of one governmental unit serving penal time is left alone by another governmental unit wanting him, unless the custodian consents to prosecution elsewhere. I think that is a rule of comity, more than one of absolute power.

I recognize, if the federal district judge when he undertook to put Schmittroth on probation considered the offense committed in San Diego County against the State of California in decreeing probation, some harshness and unfairness may arise by a state prosecution for an offense considered by the federal judge

in fixing the probation. But surely a decision to grant habeas corpus cannot rest on whether the judge granting probation took into consideration possible pending offenses in another separate and distinct jurisdiction. That would be a bucket of eels.

The best solution in this field of accommodation is to require the jurisdiction not holding the prisoner in confinement or not proceeding to prosecute to recede in its grasp for power. Leave the matter to the good sense prevailing usually in the co-ordinate jurisdiction. To do otherwise is to set up judicial strife and conflict with the consequential resultant contempt for the law.

When one court starts "enjoining" or "prohibiting" another court or releasing another's prisoners, it is always unpretty. When it is done, the call and duty ought to be clear and distinct. I do not find that call to duty here. I think it is interposition.

To hold that the federal district court was right requires us to embrace a fiction that one who is on probation is in the "custody of the law." When that fiction produces unseemly judicial conflict, as this does, the fiction ought to give way. One can be subject to a court's orders without being in the full "custody of the law," without having a protective casing of immunity.

(Endorsed:) Opinion and Dissenting Opinion. Filed May 3, 1956.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Bert Strand, Sheriff of San Diego County, State of California, Appellant, vs. William Schmittroth, Appellee.	No. 14,733

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment filed and entered: May 3, 1956.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Bert Strand, Sheriff of San Diego County, State of California, Appellant, vs. William Schmittroth, Appellee.	No. 14,733 Aug. 2, 1956

On Petition for Rehearing.

Before: Healy, Bone and Chambers, Circuit Judges.

Chambers, Circuit Judge, dissenting:

The attorney general of the State of California has petitioned in behalf of Sheriff Strand for a rehearing en banc. Our Rule 23 reads as follows:

> "A petition for rehearing may be presented within 30 days after judgment. * * * * *
>
> "All petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing.
>
> "Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc."

In conformity with our practice under the above rule, Judge Healy, Judge Bone and I have treated the petition as being before us who constituted the court for the consideration of the appeal when it was first heard. We have considered the "petition for an en banc hearing" as a "suggestion of a party."

First, I vote for a rehearing. Second, I vote for a rehearing en banc. Neither of my associates joins me. In this posture of having the necessary will, but not the necessary votes, I desire to further comment on the case with particular reference to the petition for rehearing.

The federal statutes permit us to sit en banc.[1] Our work load is such that we cannot hear all cases en banc. There is precedent in some circuits to rarely, if ever, grant rehearings en banc. Something can be said for that policy. In another circuit they are often granted. The latter practice tends to make not one appeal but two appeals from the district judgment. If certiorari is granted, that is three. A loose policy on rehearings en banc can stop a busy court from getting its work done and is too burdensome to litigants.

I prefer a policy on en banc rehearings somewhere in between the two extremes. I think the statutory authority was provided with intent that it be used now and then. Of course, in such a policy the selection of cases for en banc rehearings may demonstrate

[1]See 28 U.S.C.A. § 48(c).

some inconsistencies. I think important factors in reaching a decision on holding a hearing en banc are: 1. The existence of a dissent. 2. The existence of a pronouncement about which one may suspect his associates not yet in the case may very well disagree. 3. The presence of a decision that departs from historical operating procedure in matters such as Schmittroth's case does. 4. The announcement of a rule which may have far-reaching consequences beyond the plight of the individual before the court.

I think the only possible answers to my suggested tests on Schmittroth's case may be: 1. If the question is so important, the Supreme Court will grant certiorari, and 2. Our decision may not be widely read. Here in Schmittroth I do not accept either. I think the case is so important it should not have to wait for certiorari. And my second proposition, although lightly stated, has no validity.

Within our court as shown by our case of Western Pacific R. R. Corp. v. Western Pacific R. Co., 9 Cir., 197 F.2d 994 at 1012 et seq.[2] there are two views. The present majority of our whole court, as evidenced by the continuation of Rule 23, denies a rehearing en banc unless two of the division of three which heard the case vote for it. This does not eliminate the underlying power to change the rule or for a majority of all to join to draw the case into an en banc hearing.

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[2] On certiorari, the case appears as Western Pacific Railroad Case, 345 U.S. 247.

To date, I have thought that for other circuit judges outside a panel of three who heard the case to move in and take a case into the body of the whole court was inadvisable, absent the consent of two judges who heard the case. But I now think at some time not too distant we may have to turn to the policy of letting the whole court vote initially on the question; that is if the standard I feel is evinced here is continued.

The majority opinion here certainly needs clarifying. Does it rest on federal supremacy over the states? Although such is suggested in the majority opinion, heretofore I have closed my eyes to it, for it is unthinkable that a federal Dyer Act case rests on any higher judicial pedestal than a state's case against the same defendant for passing worthless checks. And I cannot believe the decision can rest on any point of time sequences, of dates of commission or of dates of prosecution. I have taken the majority's decision to be grounded on a theory of "on probation is to be in custodia legis," the same as if the defendant were held in durance vile. That, of course, means a state probationer will have to be released from the U.S. marshal who arrests him while he is on state probation, absent consent of the state. Indeed, under the majority's opinion, can a U.S. marshal feel safe in arresting such a probationer?

In my previous dissent, I chose to meet the decision head-on on the issue of its intrinsic merit. However, I now point out that it would appear clear that Schmittroth had no standing to vindicate the claimed authority of the U.S. District Court for the Southern

District of California. I believe the recent case of United States ex rel. Moses v. Kipp, 7 Cir., 232 F.2d 147, so holds. I believe the case is correct.

Also, since the decision herein on May 3, 1956, very interesting intelligence has come properly before this court. The attorney general of California has advised court and counsel that the order to release Schmittroth made by the district court has been obeyed by Sheriff Strand, although he still holds the original warrant for Schmittroth's arrest. Presumably he will do his duty and will rearrest Schmittroth if he can get the chance again and orders of this court do not block him. But the attorney general further advises us that the State of California has virility if not respect for the intendments of the majority decision. It seems that Schmittroth's criminal activities extend all the way from San Diego on the Mexican border to Eureka in Humboldt County, California, hard by the Oregon border. After Schmittroth was released by Sheriff Strand, Schmittroth being out on probation, committed the state crime of forgery at or near Eureka. He was rearrested in Humboldt County and there tried for the crime of forgery, convicted, sentenced to imprisonment and is now lodged in California's Folsom prison. The parties agree that this sequel does not make moot this case out of San Diego. I join in the same view.

Our problem in this case is not to inquire if the district court abused its discretion. The question is the right to exercise the discretion. Of course, it is obvious that the district court released a man who was hardly worthy of release.

But it is clear that the questions I asked in my previous dissent were not idle. There I posed the question of what would hapen if Schmittroth were now rearrested in Alameda County (Oakland) after his release at San Diego. I did not have the prescience to know it would be Humboldt County. One may say, Schmittroth can get out another writ. Then we cannot forbid it just because this time he is out of the Southern District of California, the seat of his probation, and now in the Northern District of California. Or, can we? If he sues in the Northern District surely the Northern District will not exercise the Southern District's discretion on whether Schmittroth should be prosecuted or confined by the state. Or, will it? Moreover, we shall not deny him relief at Folsom because he asked for the writ after instead of before he was convicted at Eureka. Or, shall we?

Why state these problems when they are not before use for decision? The reason for the questions is, I think, that their mere statement fully reveals untidy overtones of our basic decision and demonstrates its error.

I think the far-reaching implications of the majority's holding and the subsequent sequence richly merit consideration of the original decision by our court en banc, but I am helpless because the simple arithmetic of one plus one is greater than the sum of one plus none.

(Endorsed:) Dissenting Opinion on Petition for Rehearing. Filed, August 2, 1956. Paul P. O'Brien, Clerk.

APPENDIX TO DISSENT ON REHEARING.

As our order was ready to go down on Sheriff Strand's petition for rehearing, a supplemental memorandum has come in from the U.S. District Attorney at Los Angeles, which indicates the government has taken a long second look at the business of letting Schmittroth "call the tune" and now is wondering about the wisdom of the majority opinion herein. See ..... F.2d ..... His new brief clearly illustrates the problems the majority opinion has set up for law enforcement agencies. So trenchantly does the memorandum of the district attorney enunciate the confusion we have so recently created that I deem it advisable to set forth in totidem verbis the entire body of his memorandum. It is as follows:

> "By order of November 29, 1955, this Honorable Court requested the Attorney General of the United States to file within 30 days an amicus curiae brief outlining the position of the United States on the questions presented in the instant appeal. Thereafter, pursuant to said order, the United States filed an amicus curiae brief stating its then position and in general sustaining the views of the appellee Schmittroth.
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> "On May 3, 1956, this Honorable Court handed down its opinion upholding generally the views expressed in the amicus curiae brief. Subsequently, on June 3, 1956, appellant filed his able petition for a rehearing by this Honorable Court sitting in banc.
>
> "After a careful study of the opinion in the light of the petition for rehearing, the United States has reappraised its position in this matter.

Because of the importance of the questions here involved and the somewhat chaotic conditions prevailing among the various circuits in regard thereto, it is felt that a definitive pronouncement by the entire court would have a determinative effect in dispelling some of the doubt which presently exists as to the respective powers of state and federal courts over dual violators. Although a direct conflict exists between the various circuits it is by no means certain or even probable that the Supreme Court will have the opportunity to settle the point at this time. Therefore, while the United States does not necessarily agree in entirety with the views expressed by the appellant in its petition for rehearing, the United States is constrained by reason of the foregoing to join with appellant in respectfully requesting that this Honorable Court grant an in banc rehearing of this matter so that certain points in the original opinion may be clarified and expanded. More specifically the United States as amicus curiae urges elaboration and discussion of the following points and question arising from the original opinion. As used hereinafter the first sovereign acquiring jurisdiction will be referred to as "first sovereign" and the second sovereign acquiring jurisdiction will be denominated "second sovereign". Unless otherwise stated in the case they are respectively the sovereignties of federal and state government.

I.

"Granting that an accused has no standing to, himself, raise the question of exercise of jurisdiction by the second sovereign over him but does have a right to bring to the attention of the first

sovereign the fact that proceedings have been started against him by the second sovereign, the question remains whether the petition for writ of habeas corpus is a proper means by which to notify the first sovereign, in that habeas corpus is a well defined adversary proceeding in which the petitioner is a litigant with definite procedural rights in both trial and appellate courts.

II.

"Whether by bringing habeas corpus in the courts of the first sovereign to test detention by the second sovereign an accused is not in effect himself raising the objection to his detention by the second sovereign in contravention to the statement of the majority opinion that he lacks standing to so object?

III.

"Admitting, as the opinion does, the validity of the jurisdiction of the second sovereign prior to objection by the first sovereign, a question arises as to whether the writ of habeas corpus—running as it does solely to test jurisdiction—is properly used to vitiate or divest the jurisdiction of the second sovereign which until that time was admittedly valid? To state the question in another way, does the great writ run merely to test the validity of the jurisdiction under which the petitioner is detained or can it also be used as a means of attacking and divesting of future jurisdiction judicial proceedings, which, until the issuance of the writ, were admittedly valid?

"The opinion admits the validity of the state court to try the accused, but seems to allow this

admittedly valid jurisdiction to be set aside by habeas corpus the sole function of which is to search out jurisdictional defects existing at or before the time of its issuance and not to act in the nature of prohibition against further action.

IV.

"Whether under the provisions of 18 U.S.C. 2241 habeas corpus should have issued in this case?

V.

"Whether the jurisdiction of the second sovereign to detain and try a probationer of the first sovereign prevails in absence of express assent by the first sovereign?

VI.

"Whether this circuit wishes to adopt the decision of a divided court in *Grant v. Guernsey*, 10th Cir., 43 F.2d 593, which is at a variance with the indicated view of a majority of the circuits and was probably subsequently overruled sub silentio by the Tenth Circuit. In *Craig v. Hunter*, (1948) 10th Cir., 167 F.2d 724; *Rawls v. United States*, (1948), 10th Cir., 166 F.2d 532; *Werntz v. Looney*, (1953) 10th Cir., 208 F.2d 102.

VII.

"Whether any objection by the first sovereign to the action of the second sovereign must be asserted in the court of the second sovereign?

VIII.

"Whether the result reached in the majority opinion disabling the state from acting herein is based upon the lack of jurisdiction of the second sovereign, Federal supremacy or the exercise of the doctrine of comity, either mandatory or permissive?

IX.

"Whether, under the majority opinion, a judge of a state court having acquired first jurisdiction of an accused probationer could compel, by habeas corpus, federal officers to release said accused probationer from federal detention? In the language of the dissent is this really a "two way street?"

X.

"Whether probation from the first sovereign completely insulates the probationer from prosecution by subsequent sovereigns during the term of his probation?

XI.

"Whether a person on probation is to be considered in the custody of the law for all purposes?

XII.

"Whether under the majority opinion the immunity of a Federal probationer from State prosecutions extends to all State offenses for which he might be tried while on probation or only to those committed prior to the offense for which he was on probation?

CONCLUSION

"Because it is felt by the United States that the foregoing constitute grave questions vitally affecting the future relations of Federal and State law enforcement, the United States hereby respectfully urges this Honorable Court to grant the petition of the appellants for a rehearing by the Court in banc in order that these questions may be clarified and conclusively determined."

Appendix B

28 U.S.C. 2241:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the com-

mission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964; amended May 24, 1949, c. 139, §112, 63 Stat. 105.